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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
)
)

Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)
)

CC Docket No. 94-129

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COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATION RESELLERS
ASSOCIATION

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION	1
II. ARGUMENT	5
A. The Guidelines Proposed in the NPRM Regarding the Form and Content of LOAs Strike an Appropriate Balance	5
B. Any Limitations on Marketing Options Should be Narrowly Tailored	8
C. Relieving Customers of their Obligation to Pay for Long Distance Service in the Event of "Unknowing" PIC Changes is an Open Invitation for Abuse	14
III. CONCLUSION	16

SUMMARY

The Telecommunications Resellers Association wholeheartedly supports the Commission's efforts to ensure that consumers are not switched from one IXC to another without their authority and/or knowledge. "Slamming" cannot, and should not, be tolerated, and such safeguards as are reasonably necessary to protect against such activities should be adopted. The consuming public, however, also benefits greatly from the lower prices and enhanced customer service generated by a dynamic and competitive telecommunications marketplace. TRA, accordingly, submits that the safeguards adopted to protect consumers from slamming, and to otherwise ensure fair and ethical dealings by IXCs with the consuming public, should not result in the creation, and imposition on smaller IXCs, of unnecessary administrative and cost burdens or inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers. Protections against slamming, accordingly, should be carefully crafted and narrowly tailored so as to effectively safeguard the consuming public while minimizing the regulatory burden and avoiding any adverse effect on competition.

Consistent with these views, TRA advocates the following:

- The Commission should not prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility;
- The Commission should permit, but not require, resale carriers to identify on their LOAs their network providers so long as the role of the underlying facilities-based carrier is clearly and unambiguously described;

- The Commission should not adopt a blanket prohibition on combining inducements and LOAs on the same document, prohibiting instead combinations of inducements and LOAs which obscure in a material way the purpose of the LOA to authorize a PIC change;
- The Commission should not to adopt any broad prohibition on the use of inducements in marketing long distance services or any limits on the nature of the materials that can be included in a mailing containing an LOA;
- TRA does not oppose limitations on the use of "negative option" LOAs;
- The Commission should not limit carriers' use of "800" numbers to market long distance service, but TRA would not oppose the extension of existing telemarketing verification procedures to "800" sales;
- The Commission should adopt a compensation scheme pursuant to which consumers would be made "whole," but not afforded a "windfall," in the event of an unauthorized PIC change and thus should limit compensation to an amount equal to the difference between the amounts paid by the consumer for long distance service following the unauthorized PIC change and the amount the consumer would have paid but for the unauthorized PIC change;
- The Commission should limit the compensation scheme to the residential market, applying it in the business environment only if bad faith or wrongful intent can be shown; and
- The Commission should not relieve consumers who have been wrongfully converted from one IXC to another of their obligations under optional calling plans, but should require the unauthorized IXC to reimburse wrongfully-converted consumers for one month's flat monthly charge under such optional calling plans.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments on the rules proposed and the issues raised in the Notice of Proposed Rule Making, FCC 94-292 ("NPRM") issued by the Commission on November 10, 1994 in the captioned proceeding. TRA wholeheartedly supports the Commission's efforts to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge, but encourages the Commission in adopting protections against slamming to exercise care not only to minimize the resultant regulatory burden, but to avoid unduly hindering the ability of smaller IXCs to compete effectively. TRA urges the Commission to bear in mind that any limitations on marketing inure to the benefit of large, established providers already possessed of substantial market shares.

I.

INTRODUCTION

TRA is an association created to foster and promote the interests of telecommunications companies and carriers engaged in the resale of domestic interexchange and international telecommunications services. Employing the transmission, and often the switching, capabilities of underlying facilities-based carriers, the resale carriers comprising TRA create "virtual networks" to serve generally small and mid-sized businesses and residential customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA members also offer small business and residential customers value-added services and customer support functions which are generally not provided to low volume users.

TRA's members – nearly 300 resale carriers and their underlying service and product suppliers – range from emerging, high-growth companies to well-established, publicly-traded corporations. The resale carriers represented by TRA serve hundreds of thousands of telecommunications customers, representing more than ten billion minutes of long distance traffic annually. Today, the resale community is the fastest growing sector of the long distance telecommunications industry. Indeed, the resale industry already is populated by roughly 1,000 carriers, generates revenues in the billions of dollars and represents an already significant, and dramatically growing, percentage of the long distance telecommunications market.

TRA was chartered, among other things, to represent the views of its members before the Commission, other federal and state regulatory agencies and departments,

legislative bodies and federal and state courts. TRA is filing comments here pursuant to that mandate. Given that the continued growth and dynamism of the interexchange resale community are dependent upon the ability of resale carriers to attract new customers, regulations governing the manner in which consumers may be converted from one IXC to another are matters of critical concern to TRA's carrier members.

As noted above, TRA wholeheartedly supports the Commission's efforts to protect consumers from slamming and to ensure that consumers are not switched from one IXC to another unless such a conversion is both intended and authorized. TRA and its members are well aware that in the intensely competitive long distance telecommunications marketplace, fair and honest business practices are critical to the long term survival of the individual resellers and the resale industry as a whole. Accordingly, TRA adopted at its inception, and continues to enforce, a strict "Code of Ethics" which requires honest, fair and ethical dealings by its members with both consumers and other carriers. Thus, in order to join TRA, carriers must pledge to:

recognize and uphold their obligation to their subscriber, vendors and the general public to provide quality services at reasonable rates, under stated terms and conditions, to conduct business ethically and with integrity and to place customer satisfaction foremost in their endeavors.

And of critical importance here, TRA members must commit not to "submit orders for provisioning without customer authorization or participate in 'slamming' activities." TRA members must also agree to uphold, and, accordingly, empower the TRA Board of Directors to act upon and enforce, among others, the following standards:

- Members' advertising and promotional materials will accurately, honestly and clearly represent their company products and services as actually provided;
- Members will make available, upon request, accurate and clearly understandable rate, terms and conditions to the public;
- Members will respond to subscriber service inquiries and complaints expeditiously and honestly, and will work in good faith to resolve subscriber concerns to the subscriber's satisfaction.
- Members will accept responsibility for representations made on behalf of their company by employees or agents; and
- Members will fulfill their regulatory obligations and cooperate fully with regulatory agencies.

As further noted above, TRA is, however, concerned that safeguards adopted to minimize slamming and to otherwise ensure fair and ethical dealings by IXCs with the consuming public do not result in the creation and imposition on smaller IXCs of unnecessary administrative and cost burdens. TRA is equally concerned that such safeguards to not inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers.

Obviously a balance is required. Certainly slamming cannot, and should not, be tolerated, and such safeguards as are reasonably necessary to protect against such activities should be adopted. The consuming public, however, also benefits greatly from the lower prices and enhanced customer service that a dynamic and competitive telecommunications marketplace generates. Protections against slamming, accordingly,

must be carefully crafted and narrowly tailored to safeguard the consuming public without denying it there myriad benefits.

The Commission recognized and followed these principals three years ago in crafting procedures for verification of long distance telemarketing sales.^{1/} Thus, in the PIC Verification Order, the Commission stated that "[i]n considering the advisability of imposing requirements on carriers of all sizes, we seek to benefit consumers without unreasonably burdening competition in the interexchange market."^{2/} Moreover, the Commission "weighed ['the burden [on carriers] of implementing improved verification procedures'] against the need to protect consumers against unwanted changes in their long distance service"^{3/} and emphasized its "special concerns about potential costs imposed on smaller IXCs."^{4/} As a result, the Commission declined to adopt procedures it believed would be unduly burdensome and/or costly for smaller carriers or which would impede the ability of smaller carriers to legitimately compete for new customers.^{5/} Indeed, the Commission took pains to ensure that its revised verification procedures would "facilitate the IXCs' marketing efforts while maintaining the protection embodied in the

^{1/} Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992) ("PIC Verification Order"), recon. denied, 8 FCC Rcd 3215 (1993).

^{2/} Id. at ¶42.

^{3/} Id. at ¶44.

^{4/} Id. at ¶45.

^{5/} Id. at ¶¶42-51; see also Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935, 942 (1985) ("Waiver Order").

requirement for LOAs.^{6/} TRA urges the Commission to apply the same principals here in reevaluating its LOA requirements.

II.

ARGUMENT

A. The Guidelines Proposed in the NPRM Regarding the Form and Content of LOAs Strike an Appropriate Balance.

TRA agrees with the Commission that the requirements governing letters of agency ("LOAs") as set forth in the Commission's previously-issued Allocation Order^{7/} and PIC Verification Order should be codified into "one standard rule." NPRM at ¶¶8-10. Not only does the LOA provide, as pointed out by the Commission (at ¶7), a "useful and important consumer protection mechanism," but by minimizing slamming, LOAs help to safeguard the interests of carriers as well.^{8/} And TRA agrees with the Commission that LOAs will perform these protective functions only if consumers, when they sign an LOA,

^{6/} PIC Verification Order at ¶48; see also Illinois Citizens Utility Board Petition for Rulemaking, 2 FCC Rcd 1726, ¶19 (1987) ("Illinois CUB Order").

^{7/} Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, (1985) ("Allocation Order"), recon. denied, 102 FCC 2d 503 (1985).

^{8/} Of course, there are other means of protecting against slamming, including the confirmation procedures set forth in Section 64.1100 of the Commission's Rules, 47 CFR §64.1100, for verifying telemarketing sales of long distance service – i.e., "800" number electronic verification, verification by an independent third party, and verification by transmission of an information package which includes a prepaid, returnable postcard by means of which a customer may deny, cancel or confirm the PIC change during a 14-day waiting period. It is TRA's understanding that LOAs, following the adoption of proposed Section 64.1150, will continue to constitute only one means of documenting a consumer's election to switch long distance carriers.

are aware that they are changing, and intend to change, their long distance carriers. NPRM at ¶7.

TRA, accordingly, endorses the Commission's proposals to require that all LOAs "be printed with a type of sufficient size and readable type to be clearly legible," specify the customer's billing name and address and each covered telephone number, and confirm in "clear and unambiguous" language that (i) the customer is changing its primary interexchange carrier ("PIC") and is designating its newly selected carrier as its agent for the PIC change, and (ii) that the customer understands that it may designate only one long distance carrier per telephone number, that selection of multiple carriers will invalidate all PIC selections and that a PIC change may involve a charge. NPRM at ¶10. The proposed guidelines are sufficiently detailed to ensure that LOAs set forth clearly such information as is necessary to allow for informed consumer actions, without imposing on carriers unnecessary regulatory burdens. Any greater degree of specificity would disrupt this delicate balance, generating costs and administrative burdens without any offsetting benefit.

If, for example, the Commission were to prescribe certain language or mandate the use of a specific font or point size, carriers would be required to discard otherwise reasonable and legitimate LOAs (and the money and resources invested therein) simply because their existing LOAs were not crafted in the precise manner required by the Commission. More importantly, if the Commission and the various state regulatory authorities were each to specify in precise detail the content and form of the LOAs that could be used within their respective jurisdictions, carriers could well be confronted with

conflicting language and type specifications. Addressing and conforming to such conflicting requirements would be costly and burdensome for carriers.^{9/} Carriers, for example, could be required to develop and employ multiple versions of LOAs or to address inconsistent requirements in single LOAs. TRA thus strongly urges the Commission not to prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility.^{10/}

TRA recommends that the Commission adopt a similarly balanced approach to the identification of carriers on the LOA. TRA fully agrees with the Commission that each LOA should clearly and unambiguously identify the carrier that will provide long distance telephone service to the consumer as the consumer's primary IXC. TRA, however, strongly urges the Commission not to prohibit identification of other carriers on the LOA so long as the roles of such other carriers are clearly and unambiguously described. In particular, TRA urges the Commission to permit, but not require, resale carriers to identify their underlying network providers on LOAs. Even while consumers

^{9/} Even seemingly innocuous regulations such as a requirement that all LOAs must be captioned "An Order To Change My Long Distance Telephone Service Provider" could produce costs and burdens of this sort.

^{10/} TRA urges the Commission to follow the same reasoned approach when addressing the unique issues presented by non-English-speaking consumers. As drafted, proposed Section 64.1150 requires that LOAs be understandable and allow for informed actions by consumers. As such it prohibits carriers from knowingly employing misleading or confusing LOAs. Language barriers must be overcome if LOAs are to be understandable to non-English-speaking consumers and the requirements of proposed Section 64.1150 are to be satisfied with respect to such consumers. The precise manner in which such barriers are overcome, however, need not be prescribed. Carriers should be allowed a certain degree of flexibility in meeting the clear dictates of proposed Section 64.1150.

recognize that the resale carrier will be their primary IXC, they not infrequently require assurances that their calls will be routed over one or another carrier's physical network. Limiting the LOA only to identification of the primary IXC thus could impede the ability of resale carriers to compete effectively. And while the Commission's concern that consumers not be misled or confused by the identification of multiple carriers on an LOA is obviously valid, that concern can be addressed simply by requiring that the LOA clearly and unambiguously identify the role of each carrier identified thereon.

**B. Any Limitations on Marketing Options
Should be Narrowly Tailored.**

As noted above, TRA supports the Commission's efforts to ensure that consumers are not switched from one IXC to another without their authority and/or knowledge. TRA further agrees with the Commission that when a consumer signs an LOA, there should be an awareness that as a result of that action the primary IXC will be changed. To the extent that the coupling of LOAs with inducements has confused or misled the consuming public, TRA agrees that action should be taken to rectify this problem. The action taken should, however, be narrowly tailored to address the identified problem in order to minimize any associated adverse impact on the ability of smaller IXCs to compete effectively.

TRA is concerned that proposed Section 64.1150's blanket prohibition on combining inducements and LOAs on the same document, as well as its identification of PIC changes as the "sole purpose" of an LOA may unnecessarily hinder competitive flexibility. In part, the nature of TRA's concerns are dependent upon how broadly the

term "inducement" is defined. For example, an integral part of certain TRA members' telecommunications offerings is the ability of consumers to identify causes or charities to which funds are to be contributed by the carrier based on the consumers' traffic volumes. Such marketing strategies are not uncommon among credit card companies, including such providers as American Express, and other product and service providers. Nonetheless, the identification on the LOA of the charities or causes to which contributions are to be made could be prohibited if the ability to prompt such contributions was deemed to be an inducement. Moreover, including such designations on an LOA would seemingly violate the requirement that the sole purpose of LOAs be PIC changes. Thus, in this circumstance, the prohibitions and limitations included in proposed Section 64.1150 would interfere with legitimate marketing efforts to the detriment of competition in the long distance marketplace.

Other legitimate marketing efforts would likewise fall prey to the overly broad proposed Section 64.1150 prohibitions and limitations. For example, a check entitling the customer to a specified amount of free long distance service for switching its primary IXC could be attached to an LOA without compromising in any way the clear import of the LOA. Envision by way of illustration a document captioned in large, bold letters "An Order To Change My Long Distance Telephone Service Provider" which in addition to clearly and unambiguously confirming in large and readable type all of the information listed in proposed Section 64.1150(d), includes at the bottom a check entitling the customer to \$50 of long distance service. The customer would not be confused or misled as to the

purpose of such a document. Banning it would thus serve no purpose other than to deny carriers a legitimate marketing tool.

Certainly, LOAs which, through combination with inducements or otherwise, are designed to, or would, confuse or mislead, should be prohibited. This prohibition, however, need not be implemented in blunderbuss fashion, leaving in its wake a host of legitimate marketing tools. Confusing and misleading combinations, not all combinations, of LOAs and inducements should be targeted. IXC's should not be denied the advantage of marketing tools available to other product and service providers when the use of those tools produces no adverse impact on consumers.

TRA thus would recommend that proposed Section 64.1150 be modified in two key respects. First, the first sentence of proposed Section 64.1150(b) should be deleted. Second, proposed Section 64.1150(c) should be revised to read:

(c) The letter of agency shall not be combined with inducements of any kind on the same document in a manner which obscures in any material way the purpose of the letter of agency to authorize an interexchange carrier to initiate a primary interexchange carrier change.

Implementation of these recommendations would prohibit marketing activities which are designed to, or would, mislead or confuse consumers without eliminating promotional efforts which would not, and could not, have such an adverse impact. A somewhat more surgical approach, TRA's proposal would safeguard the interests of consumers and carriers alike.^{11/}

^{11/} In instances in which a carrier fails to comply with Commission guidelines or engages in slamming activities, more specific and demanding requirements can be imposed. See, e.g., Cherry Communications, Inc., 9 FCC Rcd 2086 (1994). Undue marketing restraints should not be imposed on all in order to prevent misconduct by a few.

Consistent with the above recommendations, TRA also adamantly opposes any broad prohibition on the use of inducements in marketing long distance service or any limits on the nature of materials that can be included in a single mailing that contains an LOA. NPRM at ¶12. As the Commission has recognized, inducements can be "proper and effective marketing devices for attracting customers to an IXC's service." Inducements are commonly used in, and are a well excepted means of, mass marketing a wide variety of products and services ranging from airline travel to magazines to banking services to office products. Inducements as a marketing tool are particularly important in more concentrated industries. Any limitation on marketing obviously inures to the benefit of large, established providers with substantial market shares. Thus in an industry in which one carrier holds a 60 percent market share and three carriers control more than 85 percent of the market, regulations which restrict the marketing flexibility of the roughly 1,000 small to mid-sized carriers that occupy the remaining 10 to 15 percent of the market should not be adopted lightly. Small to mid-sized carriers need the ability to market creatively and aggressively in order to compete with the major carriers and should not be limited in those marketing efforts unless it is necessary to do so in order to protect the consuming public, and then the restrictions should be narrowly tailored to address identified concerns.^{12/}

^{12/} In adopting "balloting" procedures nearly a decade ago, the FCC confronted an analogous situation and took care to avoid favoring the entrenched service provider:

The BOCs through their tariffs automatically presubscribe a customer to AT&T and only change that presubscription to another carrier upon request of the customer. As a result of this "default" procedure,

(continued...)

Consistent with this view, TRA does not oppose proposed Section 64.1150(e). TRA agrees with the Commission that use of "negative option" LOAs enhances the potential for inadvertent, and hence unknowing, PIC changes. NPRM at ¶11. Thus TRA agrees with the Commission that a prohibition of the use of "negative option" LOAs may be a necessary restriction on carrier marketing flexibility required to protect the consuming public.^{13/}

TRA does not agree, however, that limitations should be placed on a carriers' use of "800" numbers as a marketing device. NPRM at ¶19. The reason that a consumer calls a carrier's "800" number, whether it be to simply request information or to initiate a PIC change, is irrelevant if the consumer knowingly decides during the course of the call to change its long distance carrier. "800" numbers are one of the most widely-used and effective marketing tools available today. There are few, if any, products which are not marketed through "800" numbers. Carriers should not be denied altogether of the benefits of "800" number marketing simply because of a perceived potential for abuse.

^{12/}(...continued)

AT&T's customers may acquire its services by doing nothing. The other IXCs must, however, aggressively advertise in order to get their potential customers to take an affirmative action and select an IXC. This practice clearly accords AT&T preferential treatment and gives it an advantage over its competitors. The marketing advantage that AT&T enjoys is not predicated on any quality or pricing difference but rather on its historical monopoly position. [footnotes omitted].

Allocation Order at ¶22.

^{13/} While TRA does not object to a prohibition on the use of "negative option" LOAs, it would strenuously oppose any effort to restrict the use of Section 64.1100's "information package" with its "prepaid, returnable postcard" as one method of verifying telemarketing sales of long distance services.

To the extent that the Commission anticipates a problem, TRA submits that the preferred solution would be to apply the existing telemarketing verification procedures to "800" number sales. TRA does not oppose such an extension of these verification procedures.

C. Relieving Customers of their Obligation to Pay for Long Distance Service in the Event of "Unknowing" PIC Changes is an Open Invitation for Abuse.

The Commission has requested comment on whether "any adjustments to long distance telephone charges should be made for consumers who are victims of unauthorized PIC conversions." NPRM at ¶17. TRA does not oppose the imposition on carriers who are guilty of slamming of the obligation to compensate consumers who are wrongfully converted to an IXC not of their choosing for damages suffered. TRA is concerned, however, that a compensation scheme that does more than make the wronged consumer "whole" will be an open invitation to abuse.

The NPRM (at ¶17) suggests two alternative compensation schemes. The first such scheme would reimburse consumers for any amounts paid for long telephone service over and above the amount that they would have paid but for the unauthorized PIC change. The second such scheme would relieve wrongfully-converted consumers altogether of the responsibility to pay the unauthorized IXC for the long distance telephone service it provided to them. The first approach would make the wrongfully-converted consumers whole; the second would provide them a windfall. The second approach, accordingly, would provide the unscrupulous with an incentive to claim wrongful conversion in order to avoid payment of legitimate long distance charges. The second

approach would also impose undue penalties on carriers that had converted a consumer to their service in good faith only to find that the spouse or a relative from whom they had received authority for the PIC change was not actually empowered to grant that authority. A requirement that the unauthorized carrier make the wrongfully-converted customer whole would compensate the consumer without providing an incentive to cheat, and would penalize the unauthorized carrier without unduly punishing carriers who are guilty of unintended unauthorized conversions.

With respect to the effect that unauthorized PIC conversions have on optional calling plans and the consumers enrolled therein, TRA recommends that consumers not be relieved of their obligations under the optional calling plan in the event of an unauthorized PIC conversion, but suggests instead that the unauthorized IXC should be required to reimburse the wrongfully-converted consumer for one month's flat minimum charge. As discussed above, TRA agrees that consumers should be made whole, but urges the Commission in so doing not to penalize carriers who have been victimized by the same slamming activities. Given that the consumer should become aware of any wrongful conversion within a month, reimbursement of one month's flat minimum charge should make the consumer whole. And requiring the carrier which implemented the unauthorized change to make the reimbursement focuses the penalty on the appropriate party.

The compensation scheme adopted by the Commission, however, should be applied only to residential, and not to business users except in circumstances in which bad faith or wrongful intent can be shown. As the Commission has recognized (at ¶15),

in the business environment, there is a far greater chance that an executed LOA may not confer authority for a PIC change. A carrier that acts on an LOA which it knows to be signed by a person without authority should be required to make the business user whole. But it would be inequitable to penalize a carrier that acts on an LOA signed by an employee or other representative of a business which it in good faith believes grants it authority to implement a PIC change.


III.

CONCLUSION

By reason of the foregoing, TRA endorses proposed Section 64.1150, as modified in a manner consistent with these Comments. As noted above, protections against slamming must be carefully crafted and narrowly tailored so as to effectively safeguard the consuming public while minimizing the regulatory burden and avoiding any adverse effect on competition.

Respectfully submitted,

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